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No. 69643-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

PATRICIA A. GRANT,

Appellant,

vs.

CLAUDIO GABRIEL ALPEROVICH, M.D.; ST. FRANCIS HOSPITAL - FRANCISCAN HEALTH SYSTEM; VALLEY MEDICAL CENTER; TRIENT M. NGUYEN, D.O.; MICHAEL K. HORI; PACIFIC MEDICAL CENTER INC.; LISA OSWALD, M.D.; SHOBA KRISHNAMURTHY, M.D.; MICHELE PULLING, M.D.; WM. RICHARD LUDWIG; U.S. FAMILY HEALTH PLAN AT PACIFIC MEDICAL CENTER, INC.; VIRGINIA MASON HEALTH SYSTEM; RICHARD C. THIRLBY,

Respondents.

BRIEF OF RESPONDENTS VIRGINIA MASON HEALTH SYSTEM AND RICHARD C. THIRLBY

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ORIGINAL

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I. INTRODUCTION

The Honorable Jay White properly dismissed Appellant Grant's medical malpractice claim, with prejudice, because she lacked competent expert testimony to sustain it. In an effort to rehabilitate her claim at the summary judgment hearing, Ms. Grant presented an untimely and unsworn letter from New York physician Elliot R. Goodman, M.D., purporting to opine that unspecified physicians ("Dr. Alperovich and the other physicians treating the patient during the period between June 2009 and January 2010") deviated from an undefined standard of care.

After hearing extensive oral argument, the trial court properly struck Dr. Goodman's letter (but retained it as part of the record on review) because it was: (1) unsworn; (2) unauthenticated; (3) conclusory and non-specific as to who violated the standard of care and when; and (4) silent on the issue of medical causation.

Additionally, Dr. Goodman's letter (5) lacks foundation and (6) fails to establish his familiarity with the standard of care expected of a reasonably prudent hospital or bariatric surgeon *in Washington state*. Under *de novo* review, the trial court's dismissal of Grant's medical malpractice claims should be affirmed.

II. RESTATEMENT OF ASSIGNMENT OF ERROR

Should the Court of Appeals affirm the trial court's summary judgment dismissal of Ms. Grant's medical malpractice claim against Virginia Mason and Dr. Thirlby because Ms. Grant failed to submit competent expert testimony establishing an issue of fact: (1) that Virginia Mason and Dr. Thirlby breached the applicable standard of care; (2) that such breach proximately caused any injury; or (3) that "exceptional" circumstances exist to justify the application of *res ipsa loquitur*?

III. RESTATEMENT OF THE CASE

A. Pertinent Facts

Appellant Patricia Grant (DOB 10/21/58) has a medical history noteworthy for morbid obesity, mental illness, hypertension, plantar fasciitis, and multiple prior surgeries. (CP 41) According to her complaint, she underwent Roux-en-Y gastric bypass surgery at Valley Medical Center in June 2009.[1] (CP 3) In the months following surgery, the complaint indicates

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[1] Although her complaint makes no mention of it, Ms. Grant was actually evaluated by the bariatric surgery team at Virginia Mason's Federal Way location in November 2008. As part of her preoperative workup, Ms. Grant was referred to psychologist Lawrence Rainey, Ph.D., for a psychological evaluation. Upon learning that she had a lengthy and complex psychiatric history, Dr. Rainey requested a release for her prior mental health records. Ms. Grant declined to provide a release and eventually decided instead to undergo bariatric surgery with Dr. Alperovich.

Ms. Grant had unhappy encounters with a large number of other physicians outside Virginia Mason. (CP 4-10)

On 09/23/09, Ms. Grant was admitted by Oren Traub, M.D.,[2] at Virginia Mason's downtown hospital for inpatient evaluation of her nausea, vomiting, and inability to tolerate thick liquids or solid foods. (CP 500) Dr. Traub ordered a CT, which showed an area of fluid collection measuring 5.6 cm near her gastrojejunal anastomosis. (CP 500) These findings were reviewed by Virginia Mason bariatric surgeon Richard Thirlby, M.D. Dr. Thirlby noted multiple differential diagnoses and recommended an esophagram (a/k/a upper GI series) and an upper endoscopy, both of which were essentially normal. (CP 500)

After extensive consults with gastroenterology, infectious disease, and a nutritionist, no anatomic explanation for her nausea and vomiting symptoms was found. (CP 500) On her physicians' shared recommendation, Ms. Grant was discharged home on 09/27/09 with a plan to pursue additional studies if her symptoms persisted. (CP 500)

Ms. Grant returned to Virginia Mason on 11/02/09 with continuing complaints of vomiting, fatigue, and malnutrition. (CP 55) Gastroenterologist Drew Schembre, M.D., scheduled a deep enteroscopy with

a view of the excluded stomach to determine if there was twisting or obstruction. (CP 56) Dr. Schembre noted that Ms. Grant's underlying psychological issues may be causing her continued symptoms and noted that mental health services should be an integral part of her care. (CP 56-57)

On 12/04/09, Dr. Schembre performed a double balloon deep enteroscopy under general anesthesia. (CP 51-52) He found a small bowel obstruction proximal to the Roux limb which he surmised may be contributing to the patient's symptoms of an inability to eat. (CP 52) Dr. Schembre also noted that there appeared to be angulation to the Roux limb. (CP 52) Following this study, Ms. Grant saw Dr. Thirlby on 12/23/09. (CP 58) He reviewed the available medical records, including the studies recently performed, noting two key findings: First, the fluid collection next to Ms. Grant's anastomosis was not felt to be the source of the problem; second, during the EGD Dr. Schembre was able to easily pass the scope through the angulation at the anastomosis. (CP 58-59)

Dr. Thirlby met with the patient and explained that there appeared to be angulation to the Roux limb, but no evidence of mechanical obstruction. (CP 59) He also reviewed with her the results of the upper GI study and explained that there was no clear-cut surgical explanation for her symptoms;

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[2] Dr. Traub is employed by co-defendant Pacific Medical Center, not Virginia Mason.

therefore, surgery was not indicated. (CP 59) Dr. Thirlby did recommend placement of a nasoenteric tube into Ms. Grant's Roux limb to see if she could tolerate nasoenteric feedings. (CP 60) During this 12/23/09 visit, Ms. Grant became agitated and threatened to get a lawyer involved. (CP 60) Following this appointment, Ms. Grant did not return to Virginia Mason.

B. Procedural History

On June 15, 2012, Ms. Grant, appearing *pro se*, filed a lawsuit against 13 doctors, hospitals, and medical centers. (CP 3-13) She alleged medical malpractice and an "inference of negligence" (*res ipsa loquitur*). (CP 12)

After extensive discovery, the remaining 12 parties filed motions for summary judgment based on Ms. Grant's failure to adduce competent expert testimony establishing the standard of care. The Honorable Jay V. White heard oral argument for one-and-a-half hours on November 9, 2012. (RP at 1-42; CP 348-49)

At oral argument, Ms. Grant presented an untimely letter, dated November 7, 2012, from Elliot R. Goodman, M.D., a physician practicing in New York. (CP 345-47) The trial court paused to allow the parties to review the newly submitted letter, then heard additional arguments from all parties, including Ms. Grant. (RP at 21-38)

Respondents Virginia Mason and Dr. Thirlby (among other parties) argued that Dr. Goodman's letter was not a sworn declaration; did not establish his familiarity with Washington's standard of care; did not reference Virginia Mason; and that the only reference to Dr. Thirlby was "very non-specific and non-critical in nature. It makes some sort of sweeping conclusory allegations that there was some negligence here by someone." (RP 31:12-18) In sum, "nothing in this letter sets forth with adequate specificity who did what wrong, and when, and how that causally connects to any harm done." (RP 31:21-23) "There is no competent expert testimony establishing the elements of a 7.70 claim." (RP 32:11-12)

Co-Respondent Dr. Alperovich additionally argued that Dr. Goodman's letter lacks foundation because it does not explain which medical records he reviewed, his background and qualifications, or his familiarity with the standard of care in Washington. (RP 29:7-13; 30:1-12) Based on the foregoing arguments, Co-Respondents PacMed, Uniformed Services Family Health Plan, and Drs. Oswald, Krishnamurthy, Ludwig moved to strike Dr. Goodman's letter. (RP 32:18-20)

They also argued that Dr. Goodman's letter failed to identify who allegedly deviated "in the appropriate standard of care in the care and treatment rendered to Patricia Grant" because he conclusorily included *all*

physicians who treated her between June 2009 and January 2010. (CP 346) During that seven month period over 25 physicians were involved in Ms. Grant's care in some way or another. (RP 33:1-2)

Finally, Respondents collectively argued that Ms. Grant had failed to meet her burden of proof establishing breach and causation; had failed to raise genuine issues of material facts; and therefore, requested that the trial court grant summary judgment dismissal. (RP 6:21-25 to RP 8:21; RP 9:4 to 10:6; RP 10:12 to 11:17; RP 12:3 to 13:24; RP 14:3-12; RP 32:10-12; RP 32:15 to 33:11; RP 33:9-10; RP 35:14 to 36:11)

The trial court separately granted each party's motion for summary judgment dismissing Ms. Grant's claims. (RP 39:3-5; *see also* CP 517-18) The trial court also struck Dr. Goodman's letter, "[h]owever, it will be filed as part of the record herein." (RP 6-9) The trial court stated that "[e]ven if not stricken, the letter offers assertions and opinions with an insufficient factual basis; does not address the standard of care in Washington, and does not identify any specific deviation from the standard of care by Doctor Alperovich or the other defendants. His letter is also internally inconsistent because he did not examine the plaintiff until January 2010." (RP 40:10-15)

The trial court also ruled that Dr. Goodman's letter "does not specify acts of omissions by any of the defendants" except to assert a "deviation" in

the standard of care by Dr. Alperovich and other physicians treating Ms. Grant between June 2009 and January 2010. (RP 40:18-21)

On November 28, 2012, Ms. Grant filed a Notice of Appeal of each Order. On August 19, 2013, Ms. Grant filed an amended opening brief, which the Court of Appeals accepted.

IV. ARGUMENT

A. This Appeal Is Governed by *De Novo* Review Under the Summary Judgment Standard.

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving parties (here, Respondents Virginia Mason and Dr. Thirlby) are entitled to summary judgment as a matter of law, and if there is any genuine issue of material fact requiring a trial. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); Green v. A.P.C., 136 Wn.2d 87, 94, 960 P.2d 912 (1998).

CR 56(c) states that: "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Likewise, CR 56(e) provides:

> (e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

A defendant moving for summary judgment in a medical negligence case bears the initial burden of showing (1) that there is no genuine issue of material fact or, alternatively, (2) that the plaintiff lacks competent evidence to support an essential element of his claim. Seybold v. Neu, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001).

If the defendant shows that the plaintiff lacks sufficient evidence to support his or her case, the burden shifts to the plaintiff to produce evidence that supports a reasonable inference that the defendant was negligent. Id. Importantly, the plaintiff must respond with affidavits or other documents setting forth specific facts showing that there is a genuine issue for trial. Id.

Expert medical testimony is generally required to establish the standard of care and to prove causation in a medical negligence action. Guile v. Ballard Cmty. Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993) (citing Harris v. Groth, 99 Wn.2d 438, 449, 663 P.2d 113 (1983)). Bare assertions that a genuine material issue exists will not defeat a summary

judgment motion in the absence of actual evidence. Trimble v. Washington State Univ., 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000). Therefore, to defeat summary judgment in most medical negligence cases, the plaintiff must produce competent medical expert testimony establishing that the injury complained of was proximately caused by a failure to comply with the applicable standard of care. Seybold, 105 Wn. App. at 676. "If the plaintiff in a medical negligence suit lacks competent expert testimony, the defendant is entitled to summary judgment." Colwell v. Holy Family Hosp., 104 Wn. App. 606, 611, 15 P.3d 210 (2001).

The summary judgment procedure is intended to provide for quick disposal of actions so that wasteful time and expense of an unnecessary trial can be avoided. W.G. Platts, Inc. v. Platts, 73 Wn.2d 434, 442-43, 438 P.2d 867 (1968); *see also* Padron v. Goodyear Tire, 34 Wn. App. 473, 475, 662 P.2d 67 (1983) ("One of the important functions of the summary judgment procedure is the avoidance of long and expensive litigation productive of nothing"). Summary judgment is "a procedure for testing the existence of a party's evidence." Landberg v. Carlson, 108 Wn. App. 749, 753, 33 P.3d 406, *review denied*, 146 Wn.2d 1008, 51 P.3d 86 (2001). As with all the civil rules, Rule 56 is intended "to secure the just, speedy, and inexpensive determination of every action." CR 1.

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. Summary Judgment Dismissal Should Be Affirmed Because Ms. Grant Failed to Meet the Exclusive Criteria of RCW 7.70.

As a preliminary matter, Plaintiff's "Complaint for Medical Negligence and Damages" (CP 3-13) is exactly that: Notice of a medical malpractice claim under RCW 7.70. Although the complaint is rich with chromatic language, nothing in it gives notice of any other cause of action (at least as against Respondents Virginia Mason and Thirlby). (CP 3-13)

Ms. Grant's Opening Brief references unspecified conduct and relies upon the Health Insurance Portability and Accountability Act (HIPPA), American Disability Act (ADA), Civil Rights Act (Profiling), Fraud, and Defamation of Character in support of her medical malpractice claim. (Opening Brief at 7, 16, 19, 20, 22)

To the extent Ms. Grant attempts to premise claims on federal statutes such as HIPAA or the ADA, these are federal questions outside the subject matter jurisdiction of this Court. Moreover, nothing in HIPAA confers a private right of action to a patient against a health care provider for unauthorized disclosure. Finally, to the extent Ms. Grant has an actionable

claim under federal law, this Court should be aware that she has a remedy: In addition to this case, she is simultaneously suing all of the named Respondents in U.S. District Court for the Western District of Washington at Seattle (#2:12-cv-01045 RSL, the Honorable Robert S. Lasnik presiding).

Ms. Grant's theories and causes of action are governed and controlled exclusively by RCW 7.70. "[W]henever an injury occurs as a result of health care, the action for damages for that injury is governed exclusively by RCW 7.70." Branom v. State, 94 Wn. App. 964, 969, 974 P.2d 335 (1999).

In Washington, all health care malpractice actions arising after June 25, 1976, are governed *exclusively* by RCW 7.70:

> The State of Washington, exercising its police and sovereign power, hereby modifies as set forth in this chapter and in RCW 4.16.350, as now or hereafter amended, certain substantive and procedural aspects of *all* civil actions and causes of action, whether based on tort, contract, or otherwise, for damages for injury occurring as a result of health care which is provided after June 25, 1976.

RCW 7.70.010 (italics added).

This statute not only limits the theories under which a health care provider may be sued but, in addition, specifically delineates the necessary elements of proof which must be established in such a claim:

> **RCW 7.70.030. Propositions required to be established…** No award shall be made in any action or arbitration for damages for injury occurring as a result of health care… unless the plaintiff establishes one or more of the following propositions:
>
> (1) That the injury resulted from the failure of a health care provider to follow the accepted standard of care;
>
> (2) That a health care provider promised the patient or his representative that the injury suffered would not occur;
>
> (3) That injury resulted from health care to which the patient or his representative did not consent…
>
> **RCW 7.70.040. Necessary elements of proof that injury resulted from failure to follow accepted standard of care.** The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:
>
> (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider *at that time* in the profession or class to which he belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.

A claim against a health care provider lacking proof on any of these elements cannot be sustained. While Ms. Grant relied upon portions of RCW 7.70 in her Opening Brief at 7, she fails to prove that Virginia Mason and/or

Dr. Thirlby "failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the state of Washington, acting in same or similar circumstances" and that "such failure was a proximate cause of the injury" of which Ms. Grant complains. This is fatal to her medical malpractice claim. Summary judgment dismissal was appropriate.

C. Summary Judgment Dismissal Should Be Affirmed Because Ms. Grant's Expert Letter Was Insufficient Evidence of Medical Malpractice.

Ms. Grant contends the trial court erred in disregarding a letter written by a New York physician in support of her medical malpractice claim. (Opening Br. at 18, 22) Dr. Elliot Goodman's letter established that he saw and examined Ms. Grant sometime in January and February 2010, and performed surgery to remove an internal hernia. (CP 346-47) Dr. Goodman reviewed unidentified and "selected" medical records created between June 2009 and February 2010, and opined that "there was a deviation in the appropriate standard of care in the care and treatment rendered to Patricia Grant by Dr. Alperovich and the other physicians treating the patient during the period between June 2009 and January 2010." (CP 345-46)

Significantly, the letter provided no information about Dr. Goodman's training, experience, or specialty; how or to what extent he had examined her;

nor any explanation of why he attributed her symptoms and subsequent 2010 surgery in New York to the laparoscopic gastric bypass surgery in June 2009. Likewise, the letter does not meet the criteria of CR 56(e); fails to identify the standard of care in Washington; offers assertions and opinions with an insufficient factual basis; does not identify any specific deviation from the standard of care by Dr. Thirlby; fails to even mention Virginia Mason; and fails to establish an issue of fact on medical causation.

A defendant in a medical negligence case may move for summary judgment on the ground the plaintiff lacks competent medical evidence to make out a prima facie case. Young v. Key Pharm., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989). If it does, the plaintiff must present competent evidence to rebut the defendant's initial showing of the absence of a material issue of fact. Id. at 227. Here, Virginia Mason and Dr. Thirlby's motion for summary judgment shifted the burden to Ms. Grant to produce an affidavit from a qualified expert alleging specific facts supporting a cause of action. *See* Guile., 70 Wn. App. at 25.

In an action for professional negligence against a hospital, a plaintiff must "prove by a preponderance of the evidence that the defendant...failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession, and that as a proximate result of such failure

the plaintiff suffered damages." RCW 4.24.290; Byer v. Madsen, 41 Wn. App. 495, 503, 704 P.2d 1236 (1985).

Medical testimony is typically required to demonstrate that the alleged negligence more likely than not caused the injury. Shellenbarger v. Brigman, 101 Wn. App. 339, 348, 3 P.3d 211 (2000). It is not enough that the defendant's conduct "might have" or "possibly did" cause the injury. Miller v. Staton, 58 Wn.2d 879, 886, 365 P.2d 333 (1961).

The opinion of an expert that is only a conclusion or that is based on assumptions does not satisfy the summary judgment standard. John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 787, 819 P.2d 370 (1991). An expert must back up his or her opinion with specific facts. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 49 Wn. App. 130, 135, 741 P.2d 584 (1987) *(citing* United States v. Various Slot Machs. On Guam, 658 F.2d 697, 700 (9th Cir. 1981), *aff'd,* 110 Wn.2d 912, 757 P.2d 507 (1988)). Unsupported conclusory statements alone are insufficient to prove the existence or nonexistence of issues of fact. Brown v. Child, 3 Wn. App. 342, 343, 474 P.2d 908 (1970).

Based on the foregoing, Dr. Goodman's letter does not establish that Virginia Mason or Dr. Thirlby "failed to exercise that degree of skill, care, and learning possessed at that time by other persons in the same profession,

and that as a proximate result of such failure the plaintiff suffered damages." With respect to Dr. Thirlby, Dr. Goodman only states that the "patient was referred to a local surgeon in late December 2009, who had not performed the original operation. The surgeon (Dr. Thirlby) did not feel that surgical exploration of this patient was indicated. He felt that the risks of re-exploration outweighed the benefits." (CP 346) This statement is not an expert opinion establishing that Virginia Mason or Dr. Thirlby's acts or omissions breached the applicable standard of care.

The trial court properly deemed his letter as insufficient evidence of medical malpractice. The Court of Appeals should affirm summary judgment dismissal of Ms. Grant's claims.

D. Summary Judgment Dismissal Should Be Affirmed Because *Res Ipsa Loquitur* Is Inapplicable.

Ms. Grant alleges *res ipsa loquitur* in her complaint (CP 12), though her trial court briefing on this issue is minimal, (CP 307) and nonexistent in the Court of Appeals. Nevertheless, for purposes of completeness, Respondents Virginia Mason and Dr. Thirlby will address it.

Where applied, *res ipsa loquitur* profoundly changes the elements of proof required of a plaintiff and the defenses available to a defendant:

> The doctrine of *res ipsa loquitur* spares the plaintiff the requirement of having to prove

> specific acts of negligence in cases where a plaintiff asserts that he or she suffered injury, the cause of which cannot be fully explained, and the injury is of a type that would not ordinarily result if the defendant were not negligent. In such cases the jury is permitted to infer negligence. The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person.

Pacheco v. Ames, 149 Wn.2d 431, 436, 69 P.3d 324 (2003) (citations omitted). "The practical effect of the doctrine is to rely on circumstantial evidence to permit a presumption or inference of negligence and place upon the defendant the burden of coming forward with evidence rebutting or overcoming the presumption." A.C. v. Bellingham Sch. Dist., 125 Wn. App. 511, 516-17, 105 P.3d 400 (2004). "*Res ipsa loquitur* is to be used sparingly and only in exceptional cases." Tinder v. Nordstrom, Inc., 84 Wn. App. 787, 789, 929 P.2d 1209 (1997). *Res ipsa loquitur* applies only when the evidence shows:

> (1) the accident or occurrence producing the injury is of a kind which ordinarily does not happen in the absence of someone's negligence, (2) the injuries are caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing accident or occurrence is not due to any voluntary action or contribution on the part of the plaintiff.

Pacheco, 149 Wn.2d at 436. Whether *res ipsa loquitur* is applicable is a question of law. A.C., 125 Wn. App. at 517. Here, Ms. Grant has adduced no evidence to establish the applicability of *res ipsa loquitur*.

First, the doctrine cannot apply unless "the incident producing the injury must be of a kind that ordinarily does not occur in the absence of negligence." A.C., 125 Wn. App. at 517; *see also, e.g.*, Miller v. Jacoby, 145 Wn.2d 65, 74, 33 P.3d 68 (2001). The burden rests with the plaintiff: "The party requesting the instruction must first show that the injury is of a type that does not occur absent negligence." A.C., 125 Wn. App. at 520. The injury complained of here, a Petersen's internal hernia, is a rare but well-known risk of gastric bypass surgery. It can and does occur in the absence of negligence; Ms. Grant offers no competent expert testimony to the contrary.

Second, the doctrine cannot apply unless the defendant had exclusive control. Dr. Thirlby and Virginia Mason did not perform Ms. Grant's gastric bypass surgery. And Ms. Grant's complaint amply demonstrates that many physicians had a hand in her postoperative care:

> If the defendant does not have exclusive control of the instrumentality producing the injury, he cannot offer a complete explanation, and it would work an injustice upon him to presume negligence on his part and thus in practice demand of him an explanation when the facts indicate such is beyond his ability.

Pacheco, 149 Wn.2d at 437 (quoting Morner v. Union Pac. R.R., 31 Wn.2d 282, 296, 196 P.2d 744 (1948)).

In short, whether or not Ms. Grant's underlying psychological issues may have been contributing to her symptoms in December 2009 (as Dr. Schembre suspected), Ms. Grant cannot possibly establish the other necessary elements of *res ipsa loquitur* against Dr. Thirlby and Virginia Mason. The doctrine does not apply here. Summary judgment dismissal should be affirmed.

And in the medical malpractice context, *res ipsa loquitur* typically also requires expert testimony. *See* Miller, 145 Wn.2d at 74 ("Without knowing the professional standard of care for a health care provider placing a Penrose drain during surgery, a layperson would not be able to determine that Miller's injury would not have occurred absent negligence.").

E. Additional Discovery or a CR 56(f) Continuance Was Not Specifically Requested and Did Not Preclude Summary Judgment Dismissal.

Ms. Grant contends that she needs additional discovery to support her allegations. (Opening Br. at 17) However, her argument is unavailing because Respondents Virginia Mason and Dr. Thirlby fully answered all of Ms. Grant's written discovery. A discovery schedule does not restrict a trial

court's ability to grant summary judgment when the motion is properly brought. Guile., 70 Wn. App. at 25 n.4.

In the trial court, Ms. Grant relied on Putman v. Wenatchee Valley Med. Ctr., 166 Wn.2d 974, 216 P.3d 374 (2009). (CP 306) Putman struck down the certificate-of-merit requirement, but left untouched the predicate requirement that lawsuits have a good faith basis under CR 11. It did not adopt any rule for delaying a defendant's right to seek dismissal of unsupported claims under CR 56. A party should not be permitted to delay summary judgment "by contending more discovery is needed without showing diligence in proceeding down the discovery road." Instituto Nacional v. Continental Illinois, 576 F. Supp. 991, 1003 (N.D. Ill. 1983).

Additionally, Ms. Grant did not request a CR 56(f) continuance in her written response nor at oral argument, nor does she now explain what discovery she needed or how it would support her claims. A party faced with a motion for summary judgment may move the court under CR 56(f) to continue the hearing so that it can obtain an affidavit, deposition, or other discovery needed to justify its opposition to the motion. The rule clearly requires a party to demonstrate its need for the continuance by affidavit. Decisions construing the rule have found that the party's affidavit must also set forth the evidence the party seeks, how that evidence will preclude

summary judgment, and why additional time is needed. Durand v. HIMC Corp., 151 Wn. App. 818, 828, 214 P.3d 189 (2009); Briggs v. Nova Servs., 135 Wn. App. 955, 961, 147 P.3d 616 (2006).

"A trial court has the authority to administer its affairs to achieve the orderly and expeditious disposition of its docket." Winston v. Dep't of Corr., 130 Wn. App. 61, 66, 121 P.3d 1201 (2005) (citing Woodhead v. Discount Waterbeds, Inc., 78 Wn. App. 125, 129, 896 P.2d 66 (1996)). Accordingly, trial courts enjoy broad discretion to deny CR 56(f) continuances:

> A court may deny a motion for a continuance when (1) the requesting party does not offer a good reason for delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact. ***Only one of the qualifying reasons is needed for denial.***

Gross v. Sundling, 139 Wn. App. 54, 68, 161 P.3d 380 (2007) (emphasis added); Pitzer v. Union Bank, 141 Wn.2d 539, 556, 9 P.3d 805 (2000) (quoting Tellevik v. Real Prop., 120 Wn.2d 68, 90, 838 P.2d 111 (1992), and Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989)); *see also* Pelton v. Tri-State Mem'l Hosp., Inc., 66 Wn. App. 350, 356, 831 P.2d 1147 (1992) (affirming summary judgment in favor of doctors and hospital over request for 56(f) continuance).

"In the absence of sufficient justification, a continuance may be denied and summary judgment granted." K. Tegland, 4 Washington Prac., at 381 (5th ed. 2006). Numerous courts have affirmed the denial of a CR 56(f) continuance where the party seeking delay fails to provide adequate justification. *See*, *e.g.*, Idahosa v. King County, 113 Wn. App. 930, 55 P.3d 657 (2002); Colwell v. Holy Family Hosp., 104 Wn. App. 606, 15 P.3d 210 (2001); Janda v. Brier Realty, 97 Wn. App. 45, 984 P.2d 412 (1999); Molsness v. City of Walla Walla, 84 Wn. App. 393, 928 P.2d 1108 (1996).

Here, Ms. Grant's request for more discovery or a CR 56(f) continuance fails to establish *any* of the three essential Pitzer elements. Based on the foregoing, the Court of Appeals should affirm the trial court's summary judgment dismissal.

V. CONCLUSION

Ms. Grant received exceptional medical care while at Virginia Mason. Each provider that interacted with Ms. Grant made a concerted effort to find the etiology of her continuing symptoms. There was no indication in any of the studies performed at Virginia Mason that there was an anatomical cause of Ms. Grant's complaints *at that time* that could be resolved with further surgery. Dr. Thirlby and Virginia Mason met the standard of care with this

patient. This Court is on firm legal ground to affirm the summary dismissal of all claims against them.

Further, Respondents Virginia Mason and Dr. Thirlby respectfully submit that the fatally defective medical malpractice claim is the only claim substantially asserted against them. To the extent Ms. Grant's complaint is construed to give notice of any other cause of action against these Respondents, they join in, and incorporate by this reference, the arguments raised by Co-Respondents in support of the trial court's dismissal of such claims. Alternatively, if this Court finds that Ms. Grant has sustained any portion of any claim with competent evidence, then the case should be limited to Ms. Grant's suit against Respondents Virginia Mason and Dr. Thirlby to that claim upon which a genuine issue of material fact is deemed to exist.

Dated this 17 day of September, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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DATED this 17th day of September, 2013.

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